El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, INC. Respondent, and UNITED. FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-263-EC 80-CE-264-EC 8 ALRB No. 55

DECISION AND ORDER

On October 27, 1981, the Executive Secretary ordered the attached Decision and recommended Order of Administrative Law Officer (ALO) Michael Weiss transferred to the Agricultural Labor Relations Board (ALRB or Board). Thereafter, Respondent, General Counsel, and the United Farm Workers of America, AFL-CIO (UFW) timely filed exceptions and supporting briefs and General Counsel filed a reply brief.

Due to the general interest in and importance of the issue presented by General Counsel's exception seeking an increase in interest or an inflation factor to be applied to the backpay and other monetary remedies recommended by the ALO, we scheduled the matter for oral argument in consolidation with two other cases and invited numerous interested parties to present their views in writing and orally.

The Board has considered the record and attached Decision in light of the exceptions and briefs of the parties and amici curiae and has decided to affirm the rulings, findings, and

conclusions of the ALO and to adopt his recommended Order as modified herein. In addition, after consideration of the positions of the parties and amici curiae, and our review of the statutory language, purpose, and policies of the National Labor Relations Act (NLRA) and the Agricultural Labor Relations Act (ALRA or Act), we have determined that the decision of the National Labor Relations Board (NLRB) in Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070] is applicable NLRA precedent under Labor Code section 1148,[1/] which we shall adopt for the computation of interest payable on monetary awards under the ALRA.

Unfair Labor Practices

The unfair labor practices alleged in this case arose from failed contract negotiations begun in late 1978 between Respondent Lu-Ette Farms (Lu-Ette) and the UFW, which was certified on September 29, 1976, as the exclusive collective bargaining agent of Respondent's agricultural employees. A contract signed between Lu-Ette and the UFW on December 2, 1977, was scheduled to expire on January 1, 1979. The Union and Lu-Ette negotiated an extension until January 15, 1979, but further negotiation broke down, and a second contract was never signed. In December of 1978, Lu-Ette joined an industry-wide bargaining group of 28 growers.

On January 19, 1979, after three days of slowdown, Lu-Ette's lettuce workers went out on strike.

On February 28, 1979, the employer group declared impasse which we found to be in bad faith in Admiral Packing, et al.

[1/] All code references herein are to the California Labor Code unless otherwise specified.

(Dec. 14, 1981) 7 ALRB No. 43, Member McCarthy dissenting, which issued after the ALO's Decision was issued in this case. We found that the strike against the vegetable growers, including Lu-Ette, commenced as an economic strike, but was converted into an unfair labor practice strike when impasse was declared.

This case involves allegations that Respondent refused to rehire strikers when they offered to return to work, refused to accept the certified letters containing the offers to return, refused to provide information requested by the Union in negotiation sessions, and unilaterally raised employees' wages in December of 1980.

Although we agree with the ALO that the strikers' offers to return were not invalidated or made conditional by the Union's failure to explicitly offer to terminate the strike, we also find that Respondent waived its defense that the offers were not unconditional by failing to assert it in a timely manner. (Colecraft Mfg. Co. (1967) 162 NLRB 680 [64 LRRM 1174] enforced in pertinent part, (2d Cir. 1967) 385 F.2d 998; Comfort, Inc. (1965) 152 NLRB 1074 [59 LRRM 1260] enforced (8th Cir. 1966) 365 F.2d 867, 877-878; NLRB v. W. C. McQuaide, Inc. (3d Cir. 1977) 552 F.2d 519 [94 LRRM 2950].)

We agree with General Counsel that the appropriate remedy is immediate reinstatement for all strikers, regardless of any lack of vacancies due to replacement hiring. Two seasons have passed since the offers to return were made, and Respondent's payroll records show that the replacement workers, whether hired before or after the strike was converted into an unfair labor practice strike,

did not return in large numbers the next season. If the strikers were replaced after the economic strike was converted into an unfair labor practice strike, it is clear that the strikers would have had an absolute right to immediate reinstatement upon making unconditional offers to return. Even if the replacement employees were hired before impasse was declared, and the strikers were thus not entitled to immediate reinstatement, the evidence establishes that, due to turnover between seasons, Respondent had vacancies at the beginning of the 1980-1981 season which it could have filled by hiring strikers who had made unconditional offers to return to work between April and October 30, 1980. In addition, we note that even if there was no evidence of turnover between seasons, the presumption announced in Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40, would mandate the strikers' reinstatement in the season immediately following their offer to return.[2/] Backpay for individual strikers then dates from the commencement of the season immediately following their respective offers to return.

We reject the ALO's finding that Respondent's refusal to accept the Union's certified letters containing the offers to return amounts to an independent violation of the Act. However, our decision is based upon the Respondent's representations in its exceptions brief that the strikers were not prejudiced by that refusal because the date of Respondent's receipt of the offers is not at issue. Therefore, Respondent would be precluded from

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[2/] Member McCarthy would not rely on application of the rule announced in Seabreeze Berry Farms, supra, 7 ALRB No. 40, to find a violation.

arguing at compliance that its failure to receive the offers sent by certified mail tolled the commencement of the backpay period.

Finally, we note that our Decision in Nish Noroian Farms (Mar. 25, 1982) 8 ALRB No. 25, holding that an employer has a duty to bargain with a certified union until decertification occurs or until a rival union is certified through the procedures of the ALRA, defeats Respondent's loss-of-majority defense to the refusal-to-bargain allegations. We do not approve the ALO's deferral of resolution of that issue to an ALO decision in a related case.

We agree with Respondent that requiring it to provide copies of a remedial Notice to all employees hired during the 12-month period following issuance of the Order is excessive and accordingly we shall delete that provision from the remedial Order. However, we find that confining the mailing of Notices to "employees employed at any time during the payroll periods immediately preceding and following October 30, 1980," is inadequate to notify the discriminatees since they were not rehired at that time. Therefore, we have modified the Order to require mailing to all strikers as well as to all employees who were hired from the date(s) the offers to return were made until the date of the mailing of the remedial Notice to Agricultural Employees.

Backpay Interest

We have also decided to modify the ALO's recommended Order to provide for interest to be computed according to the NLRB decision in Florida Steel Corporation, supra, 231 NLRB 651.

The NLRB determined in Florida Steel that, due to spiraling inflation, unfair labor practices would be more adequately

remedied by application of an adjustable interest rate to monetary awards. It has become apparent that the seven percent interest rate currently applied to ALRB monetary awards inadequately compensates discriminatees and other victims of unfair labor practices, and tends to discourage voluntary settlements and to encourage dilatory tactics by respondents.

The formula chosen by the NLRB was that used by the Internal Revenue Service (IRS) on overpaid and delinquent taxes, namely 90 percent of the "average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System." (Florida Steel Corp. , supra, 231 NLRB at 652, fn. 9.) At the time Florida Steel was decided, the IRS adjusted its rate biannually, effective on February 1, using the September rate of the year preceding the adjustment. (26 USC § 6621, added January 3, 1975, Pub.L. 93-625, § 7(a)(l), 88 Stat. 2114.) Since issuance of the Florida Steel decision, the IRS has changed the formula to reflect the recent escalation in inflation and now applies 100 percent of the prime rate, adjusted annually. (26 USC § 6621, amended August 13, 1981, Pub.L. 34 § 711 (a) and (b) , 95 Stat. 340.) Consistent with the IRS change, the NLRB raised the interest rate on monetary awards to 20 percent, effective January 1, 1982. (See NLRB General Counsel Memorandum 82-5, Bureau of National Affairs, Daily Labor Report No. 21, Feb. 1, 1982, p. A-6.) On January 1, 1983, the rate will be adjusted either up or down to reflect the prime rate pertaining

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to September 1982.[3/]

Our determination that the Florida Steel decision is applicable precedent under section 1148 is coupled with our rejection of arguments by Respondents and amici curiae representing employers that article XV, section 1 of the California Constitution restricts this Board in the rate of interest which it can order to be paid on its backpay awards.[4/]

Article XV, section 1, as amended in 1979, sets forth interest rate restrictions on voluntary loan transactions and court judgments. It provides in pertinent part:

> The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than ten percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. In the absence of the setting of such rate by the Legislature,[5/] the rate of interest on any judgment rendered in any court of the state shall be seven percent per annum.

The General Counsel argues for a strict construction of

[3/] In accordance with NLRA precedent, our new interest rate, of course, will be applied prospectively only. (See Florida Steel Corp., supra, 231 NLRB 652, fn. 12.) Therefore, unpaid monetary awards will accrue interest at the old rate of seven percent until the date of issuance of this Decision. The 20 percent rate will then apply until the January 1, 1983, adjustment.

[4/] However, application of article XV, section 1, to either Board orders or court enforcement orders would only affect the interest rate applicable from the time of the order and therefore would not preclude imposition of the Florida Steel rate from the time of the unfair labor practice until the date of the order. The ten percent constitutional rate would then be applied to both the principle and the accrued Florida Steel interest.

[5/] Senate Bill No. 203, signed by Governor Brown on April 6, 1982, provided that prejudgment interest allowable in personal injury and postjudgment interest allowable on court judgments in general be raised from seven to ten percent.

the constitutional language whereby orders of state administrative agencies, even if arrived at by quasi-judicial means, not be considered "court judgments,"

The ALRB is not a "court" established under article VI, section 1 of the California Constitution. Rather, it is an agency granted judicial powers by the Legislature under article XIV, section 1, for "the general welfare of employees." (Perry Farms, Inc. v. ALRB (1978) 86 Cal.App.3d 448, 460 [150 Cal.Rptr. 495].) Although the Board's processes incorporate procedural safeguards of the NLRA and ensure the essentials of due process, they are defined by the ALRA and the Board's Regulations and not by the Codes of Civil and Criminal Procedure which guide the courts. The United States Supreme Court described the difference between the courts and the NLRB, noting that the NLRB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (Universal Camera Corp. v. NLRB (1951) 340 U.S. 474, 488 [95 L.Ed. 456, 467; 71 S.Ct. 456].) See also Tex-Cal Land Management, Inc. v. ALRB (1979) 24 Cal.3d 335, 350 [156 Cal.Rptr. 1] , where the California Supreme Court upheld the provision in section 1160.8 of the ALRA allowing for the review of ALRB orders in appellate courts, using the substantial evidence standard.

Whereas the courts have interpreted the term "court judgment" in article XV, section 1, to include such proceedings as

tort judgments against the state,[6/] and interlocutory condemnation judgments under California Code of Civil Procedure, section 1237, et seq.,[7/] it has been held not to apply to "special" condemnation proceedings under statutes enacted pursuant to article XII, section 23a of the California Constitution, concerning the fixing of compensation by the Public Utilities Commission (PUC) for the taking of a public utility's property by eminent domain. (City of North Sacramento v. Citizens Utilities Co. (1963) 218 Cal.App.2d 178 [32 Cal.Rptr. 308].) Like ALRB proceedings, the PUC determinations are made pursuant to a separate grant of constitutional authority and the legislation enacted thereunder and are subject to very limited judicial review. (See City of North Sacramento v. Citizens Utilities Co., supra, 218 Cal.App.2d at 182.)

We are persuaded by the above, cases and considerations, as well as by the significant differences which exist between court judgments and Board Orders, that on its face, article XV, section 1 does not apply to Board Orders.

We come to the same conclusion with regard to the status of Board Orders and court enforcement thereof by consideration of the purpose and policy behind the constitutional provision.

Article XV, section 1, formerly article XX, section 22, was originally adopted by initiative as a usury law in the November 1918 election. It is now set forth in Civil Code

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6/See Harland v. State of California (1979) 99 Cal.App.3d 839 [160 Cal.Rptr. 613] and Straughter v. State of California (1980) 108 Cal.App.3d 412.

7/See Bellflower City School District v. Skaggs (1959) 52 Cal.2d 278 [339 Pac.2d 948].

section 1916-1, et seq. In 1934 a Constitutional provision was added limiting the interest rate to seven percent "upon the loan or forebearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the state ...." (Emphasis added.) In 1978 the words "or judgment rendered in any court of the state" were deleted from the usury section and the two paragraphs quoted above relating to court judgments were appended. The present article XV, section 1, makes no mention of administrative agencies or orders, and General Counsel argues that the section applies only to judgments in private disputes over private transactions.

At least one court has employed the same rationale in holding article XX, section 22, predecessor to article XV, section 1, not applicable to PUC proceedings fixing compensation for the taking of a public utility's property by eminent domain. (City of North Sacramento v. Citizens Utilities Co., supra , 218 Cal.App.2d 178.)

> The procedure set forth in these sections (417-419 ' of the Public Utilities Code) recognizes the inherent difference between the property of a public utility and other property. The utility's property has already been dedicated to use by the public .... (218 Cal.App.2d at 189.)

We are persuaded that a substantial difference exists between damage judgments of civil courts and the awards made by this Board, even after they are enforced by the courts. Unlike the private remedy afforded by civil court damage judgments, a backpay order is a public reparation award designed to vindicate

public policy.[8/]

We have concluded that neither the fact that Board processes resemble those of a court and involve the exercise of "judicial power" nor the fact that enforcement is effectuated through the courts makes our monetary awards "court judgments" to which the constitutional limitation on interest rates applies.

Even if we were to assume, arguendo, that article XV, section 1 encompasses any exercise of judicial power, the California Supreme Court in Regents of University of California v. Superior Court of Alameda County (1976) 17 Cal.3d 533 [131 Cal. Rptr. 226] (hereafter Regents) indicated that a state agency exercising "sovereign governmental powers" would be exempt from the operation of the provision "if [its] inclusion would result in an infringement" on those powers. (Regents, supra, 17 Cal.3d at 536, quoting City of Los Angeles v. City of San Fernando (1975)

[8/] See e.g., International Sound Technicians v. Superior Court (1956) 141 Cal.App.2d 23, 30; NLRB v. J. H. Rutter-Rex Mfg. Co. (1969) 396 U.S. 258 [90 S.Ct. 417]; Nathanson v. NLRB (1952 344 U.S. 25 [73 S.Ct. 80]; NLRB v. Reynolds Corp.TBTh Cir. 1946) 155 F.2d 679 [18 LRRM 2087]; NLRB v. International Association of Bridge, Structural and Ornamental Iron" Workers Local 433"(9th Cir. 1979) 600 F.2d 770 [101 LRRM 2440]; NLRB v. Mastro Plastics Corp. (2d Cir. 1965) 354 F.2d 170 [60 LRRM 2578]; Philip Carey Mfg. Co., Miami Cabinet Division v. NLRB (6th Cir. 1964) 331 F.2d 720
[55 LRRM 2821].It should be noted that while private parties are needed to initiate unfair labor practice proceedings by filing the original charge, only the General Counsel can issue a complaint and prosecute a case to hearing, Board appeal, and court enforcement. Individuals who are the beneficiaries of a court order enforcing an ALRB Order have no property right in the award until received so that it cannot be attached prior to receipt as can an ordinary private judgment or chose in action. (NLRB v. Sunshine Mining Co. (9th Cir. 1942) 125 F.2d 757, 761 [9 LRRM 618]; see also NLRB v. Threads, Inc. (4th Cir. 1962) 308 F.2d 1, 3
[51 LRRM 2074].)

14 Cal.3d 199, 276-277 [123 Cal.Rptr. 1, 57-58].)[9/]

In Meilink v. Unemployment Reserves Commission (1942) 314 U.S. 564, 566-567 [62 S.Ct. 389, 391], the United States Supreme Court analyzed the California Legislature's decision to impose a 12 percent interest rate on unpaid employer contributions under the California Unemployment Reserves Act. The Court rejected the employer's argument that, by exceeding the 7-10 percent rate established by article XX, section 22, of the California Constitution (the predecessor to article XV, section 1), the legislature had imposed a penalty not claimable under the Bankruptcy Act. Noted the Court:

> We do not understand that as a matter of state law the California legislature was thereby [by virtue of Article XX, section 22] forbidden to prescribe the higher rate here involved. (314 U.S. 564 at 567.)

In 1975 the California Legislature passed Assembly Bill 2306, amending the Revenue and Taxation Code and the Unemployment Insurance Code to allow for interest at a rate of 12 percent on deficiencies, overpayments, and recouped refunds of various taxes and employer insurance contributions. On February 17, 1982, the Governor signed a bill raising the rate from 12 to 18 percent (Assembly Bill No. 8).

The Revenue and Taxation Code specifically applies the new rates to interest allowed in its own deficiency determinations

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[9/]The university, in Regents, was not afforded this sovereign protection from either the constitutional or the statutory usury laws because the Court found that its activities as a lender were no different from those of private lenders; therefore, it was not engaged in the exercise of its sovereign governmental powers.

as well as "in any judgment" (emphasis added) of overpayment from the date of payment "to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days ...." (See Rev. & Tax. Code sections 6936, 8151, 9174, 11576, 13107, 16272, 19091, 19538, 26107, 26281, 30406, and 32417.) Such provisions would be nonsensical if read as subject to the restrictions of article XV, section 1.

The examples cited above indicate to us that the courts and legislature would not apply the interest rate limitations of article XV, section 1, to the exercise of an important sovereign governmental power: the adjudication, remedying, and deterrence of unfair labor practices, including the enforcement of our Orders in state courts. (Sections 1160.2, et seq.)

Our decision to adopt the Florida Steel formula for interest on backpay awards is informed by more than our conclusion that we are not restricted by article XV, section 1.

We find that the Florida Steel decision is "applicable precedent" of the NLRA which section 1148 of our Act requires us to follow.[10/] An element or theory of damages is a substantive rather than procedural matter, encompassed by the section 1148 mandate. (Agricultural Labor Relations Bd. v. Superior Court of Tulare County (1976) 16 Cal.3d 392 [128 Cal.Rptr. 183] appeal dismissed

[10/]We reject the novel argument made by amicus curiae Titchell, Maltzman, Mark, Bass & Ohleyer in its brief and at oral argument that only pre-Act (pre-July 1975) NLRA precedents must, under section 1148, be followed by this Board. We are convinced that the Legislature intended for us to follow applicable NLRA precedent on a continuing basis.

429 U.S. 802 [97 S.Ct. 33, 34]. Cf. Plantation Key Developers, Inc. v. Colonial Mortage Co. (5th Cir. 1979) 589 F.2d 164.) The California Supreme Court has approved our interpretation of the term "applicable" as meaning relevant to the particular problems of labor relations on the California agricultural scene. (ALRB v. Superior Court of Tulare County, supra, 16 Cal.3d 392.) No factors distinguishing inflation and financing conditions in agriculture from other industries have been cited to us to persuade us that the NLRA precedent would not be applicable to the agricultural setting.[11/] The NLRB's rationale in adopting the IRS formula is equally appropriate herein:

> A rate of interest more accurately keyed to the private money market would have the effect of encouraging timely compliance with Board Orders, discouraging the commission of unfair labor practices, and more fully compensating discriminatees for their economic losses .... (Florida Steel Corp., supra, 231 NLRB 651.)

The factors which led the NLRB in Florida Steel to adopt the IRS adjustable interest rate, as opposed to an increased flat rate urged by its general counsel or an adjustable inflation factor recommended by the Administrative Law Judge (ALJ), were as follows:

[11/]The Union's argument that the rate should reflect the higher interest rates available to agricultural workers whose low income and lack of assets limits their access to financing assumes that the rate should be pegged to the rate at which the victim would have to borrow rather than that accessible to the perpetrator of the unfair labor practice. Consistent with the rationale of precluding respondents from profiting by delay, the NLRB recently rejected such an approach in favor of the "stability and predicta bility which exists under the Florida Steel formula." (Olympic Medical Corporation (1980) 250 NLRB 146 [104 LRRM 1325].)

> First, it is directly tied to interest rates in the private money market. Second, it is subject to periodic semi-automatic adjustment. Third, it is relatively easy to administer, as it cannot be changed more frequently than once every two years;[12/] adjustments are announced well ahead of the effective date; and the rate is rounded to the nearest whole percent. (Florida Steel Corp., supra, 231 NLRB at 652.)

More recently, NLRB decisions have referred to the "stability and predictability" which exists under the Florida Steel formula due to the four-month advance notice of rate changes, facilitating settlement and furthering efficient use of agency resources. (Olympic Medical Corporation, supra, 250 NLRB 146, at p. 147.)

Because we find Florida Steel to be applicable precedent under section 1148, we shall henceforth, from the date of issuance of this Decision, compute interest on backpay and other monetary awards according to the formula announced therein.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Lu-Ette Farms, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to reinstate striking workers who offer, or who have offered, to return to work.

(b) Failing or refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW), or to provide the UFW with

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[12/]As noted above, the adjustment is now made every year.

information requested during the October 30, 1980, meeting of the parties and repeated in its letter of November 2, 1980, or any other relevant information that the UFW may request in connection with its collective bargaining responsibilities.

(c) Instituting or implementing any change in any of its agricultural employees' wages, work hours, or any other terms or conditions of employment without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such change(s).

(d) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Offer to all of its employees who went on strike in January of 1979 and thereafter made unconditional offers to return to work full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them after the receipt of their unconditional offers to return to work, reimbursement to be made in accordance with the formula established by Board precedent, plus interest at the rate of seven percent per annum until the date of issuance of this Order, thereafter at the rate of twenty percent per annum until

January 1, 1983, and from that date in accordance with NLRB and ALRB precedents.

(b) Provide the UFW with the information which it requested at the October 30, 1980, meeting of the parties and repeated in its letter dated November 2, 1980.

(c) Upon request, meet and bargain collectively with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in its employees' wage rates.

(d) If the UFW so requests, rescind the unilateral change in wage rates made by Respondent on or about December 1, 1980.

(e) Make whole its employees for all economic losses they have suffered as a result of the unilateral changes in wage rates made by Respondent on or about December 1, 1980.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all personnel records, social security payment records and reports, time cards, and other records relevant and necessary to determination by the Regional Director of the backpay period and amount of backpay due to its employees under the terms of this Order.

(g) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(h) Post copies of the attached Notice, in all

appropriate languages , in conspicuous places on its property for 60 days, the time(s) and place (s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(i) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all of Respondent's agricultural employees employed at any time during the payroll period immediately preceding the strike of January 19, 1979, and from October 30, 1980, to the date of the Notice.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report

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periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: August 18, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

MEMBER McCARTHY, Concurring:

I join in all aspects of the Decision except the method by which the interest on the monetary award is determined.[1/] Instead of using the prime-rate-based interest formula applied by the IRS in tax matters, which is changed only once each year, I would simply apply the prime interest rate and adjust it on a quarterly basis. Quarterly adjustment would make the interest rate more current and accurate for the period for which interest is being assessed. Such adjustment would comport fully with the principle established in Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070], i.e., utilization of a semi-automatic adjustment of interest rate tied to private sector rates, as contrasted with the fixed rate approach utilized theretofore. Indeed,

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[1/]The NLRB described the IRS rate as the "vehicle" it chose to implement the interest rate approach it adopted in Florida Steel Corporation, supra. As such, it is merely procedural and not substantive NLRA precedent which we are bound to apply under section 1148 of the ALRA.

quarterly adjustment would better achieve the purposes of "compensating the discriminatee for the loss of use of his or her money," and would "encourage more prompt compliance with Board Orders without placing a significant additional burden on the wrongdoer." If, for example, the prime interest rate one month from now (September 1982) is approximately fifteen percent, as now seems likely, that rate will apply for all of 1983. If the prime rate climbs well above that figure, and substantial fluctuation in the prime rate is not uncommon in these times of economic uncertainty, we would have an unrealistically low interest rate that might well lead to delayed compliance with our Orders. On the other hand, if the prime rate drops significantly, we may find ourselves assessing an interest rate which is unrealistically high and therefore punitive. For example, effective with the majority's Decision, the interest rate applied to monetary awards from now until January 1, 1983, will be twenty percent per annum, even though the current prime rate would be fifteen percent.

Given these circumstances, I do not subscribe to the majority imposition of an interest rate that is adjusted only annually.

Dated: August 18, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which each side had an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have interfered with the rights of our agricultural workers by refusing to rehire striking workers and to give information to the Union and by raising wages in December 1980 without notifying or bargaining with the Union. The Board has ordered us to distribute and post this Notice. We will do what the Board has ordered and also tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights.

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT fail or refuse to hire or reinstate, or lay off or threaten or discriminate against any employee because he or she exercises any of these rights.

WE WILL NOT fail or refuse to bargain with the UFW or change your wage rates or any other working conditions without first notifying, and bargaining with, the UFW about such matters because it is the representative chosen by our employees.

WE WILL, if the UFW asks us to do so, rescind the changes we previously made in the wages of our employees and we will make our employees whole for all economic losses they have suffered as a result of those changes, plus interest computed in accordance with current National Labor Relations Act and ALRB precedents.

WE WILL offer reinstatement to all strikers who unconditionally offer to return to work with us and we will reimburse each of them for all pay and other money they lost because we refused to reinstate them.

Dated: LU-ETTE FARMS, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California, 92243. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Lu-Ette Farms, Inc. (UFW)

8 ALRB No. 55
Case Nos. 80-CE-263-EC
80-CE-264-EC

ALO DECISION

The ALO found that Respondent had discriminatorily refused to rehire strikers who had made written unconditional offers to return to work which were sent to the Employer by the Union, followed by an oral offer to return made by a Union representative at a bargaining session. The ALO rejected Respondent's defense that the offers were not unconditional because they were not accompanied by an offer to abandon the strike which continued against Respondent and several other growers. The ALO also found Respondent had violated sections 1153(c) and (a) by refusing to accept the Union's certified letters bearing the offers to return and section 1153(e) and (a) by unilaterally raising wages and by refusing to provide information about its current work force and operations requested by the Union at a negotiating session. The ALO made no findings or conclusions as to Respondent's loss-of-majority defense but deferred that issue to the ALO (LeProhn) in a related case. The ALO denied General Counsel's request for imposition of an increased interest rate on backpay and other monetary awards.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions as to all violations alleged in the complaint except his finding that Respondent violated the Act by refusing to accept the Union's certified letters seeking rehire of strikers. The Board rejected the Employer's loss-of-majority defense on the basis of Nish Noroian Farms (Mar. 25, 1982) 8 ALRB No. 25, and modified the ALO's reinstatement order to require immediate reinstatement and backpay dating from the beginning of the 1980 season. Finally the Board decided that Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070] is applicable precedent under section 1148 and adopted its formula for computation of interest on monetary awards,

Member McCarthy concurred in the result, including application of an interest rate on monetary awards which is based on the prime rate of interest, as per Florida Steel Corporation, supra. However, he would provide for adjustment of the interest rate on a quarterly basis rather than on the annual basis utilized by the IRS and followed by the NLRB.

* * *

* * *

LAW OFFICE OF
MICHAEL H. WEISS

1182 MARKET SUITE 320 SAN
FRANCISCO. CA 94102
TELEPHONE (415) 626-5433

October 21, 1981

Jorge Carrillo
Executive Secretary
A.L.R.B.
915 Capitol Mall, 3rd Floor
Sacramento, CA 94814

Re: Lu-Ette Farms, Inc.
80-CE-263- EC

Dear Jorge,

In reviewing the decision I filed last week in the above-entitled matter, I omitted the following from the recommended Order portion that was set forth as Paragraph 4, page 32 of the recommended Remedy portion:

> "Reinstate those striking Lu-Ette workers who have made unconditional offers to return to work. Respondent shall further make whole each of the entitled striking workers, by payment to them of a sum of money equal to the wages they would have earned but for Respondent's unlawful refusal to reinstate them, less their respective net earnings, together with interest thereon at seven per cent per annum. Back pay is to be computed in accordance with the formula established in J & L Farms. 6 ALRB No. 43 (August 12, 1980).
>
> If there are not sufficient jobs available to reinstate each of the claimants immediatley or at the succeeding harvest they would otherwise have worked, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. The order of names on the preferential list shall be determined by company seniority or pursuant to some other non-discriminatory method.

For purposes of continuity the aboved recommended Order should be sub-paragraph (k) on page 36 of the decision.

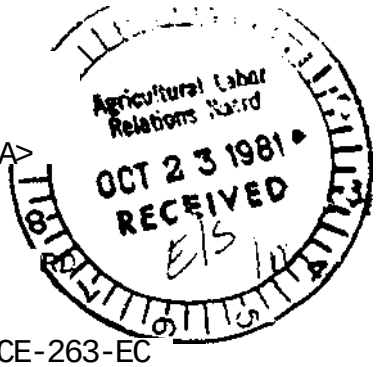
Yours very truly,

Michael H. Weiss

cc: Sarah A. Wolfe
J. Kenneth Donnelly
Ned Dunphy

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOA>



In the Matter of:	)	
LU-ETTE FARMS, INC.,	)	
Respondent,	)	Case Nos. 80-CE-263-EC 80-CE-264-EC
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	ADMINISTRATIVE LAW OFFICER'S DECISION
Charging Party	)	

Appearances:

For the General Counsel;	J. KENNETH DONNELLY Sacramento, California
For the Respondent:	SARAH A. WOLFE, DRESSLER, QUESENBERY, LAWS & BARSAMIAN
For the Charging Party:	NED DUHPHY Keene, California

STATEMENT OF THE CASE

MICHAEL H. WEISS, Administrative Law Officer:

This case was heard before me on three hearing days, July 13-15, 1981, in El Centro, California. The initial complaint was issued on April 7, 1981, and amended on July 6, 1981. The amended complaint alleges violations of Section 1153(a), (c) and ; (e) of the Agricultural Labor Relations Act [hereinafter the Act]j by LU-ETTE FARMS, INC. (hereinafter LU-ETTE or Respondent].

All parties were given full opportunity to participate

in the hearing and after the close of the hearing the General Counsel and Respondent each filed a brief in support of its respective position.[1/]

Upon the entire record,[2/] including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent admits the jurisdictional allegations, e.g., that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the United Farm Workers of America, AFL-CIO [hereinafter UFW]is a labor organization within the meaning of Section 1140.4 (f) of the Act. On the basis of the pleadings and undisputed evidence I so find.

II. The Unfair Labor Practices

A. The Unfair Labor Practice Allegations

The Amended Complaint alleges that Respondent violated Sections 1153 (a), (c) and (e) of the Act: (1) by refusing to accept certified mail from the charging party UFW; (2) by

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[1/] The parties served their post-hearing briefs by mail on August 24, 1981. However, the General Counsel inadvertently served his brief on Administrative Law Officer Robert LeProhn who has under submission a previous LU-ETTE case. This error was rectified on September 2 when I received General Counsel's brief.

[2/] Attached hereto as Appendix I is the list of four witnesses called by the parties, as well as the Transcript Volume and page references to their testimony; Appendix II is the list of the exhibits identified and/or admitted into evidence.

refusing to provide information requested by the UFW; (3) by failing and refusing to recall striking employees who had made offers to return to work which were communicated to Respondent by the UFW; and (4) by unilaterally increasing the piece rate paid to Respondent's lettuce harvest workers without providing notice to or bargaining with the UFW.

Respondent in its Second Amended Answer denied all material allegations of violations of the Act and alleged by way of affirmative defense: (1) that any issue of bad faith declaration of impasse has been fully litigated and will be controlled by the decision to be rendered in Admiral Packing, Case No. 79-CE-36-EC, et al., by the Board;[3/] (2) that the offers to return to work which were not submitted within the six month period immediately preceding the filing of the underlying charge on December 23, 1980, are barred by Labor Code Section 1160.2; (3) that a portion of the relief requested in the complaint, i.e the method for calculating reimbursement to workers who offered to return to work, is not a proper subject of an unfair labor practice hearing and order; (4) that Respondent has not violated the Act by failing to bargain with the UFW because Respondent had a good faith belief that the majority of its employees failed to support the UFW; and (5) that the offers to return to work made by striking LU-ETTE employees were not unconditional in

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[3/] The parties are agreed that the Admiral Packing case, when decided by the Agricultural Labor Relations Board, will be dispositive of this issue.

nature and therefore of no legal consequence.

At the pre-hearing conference, General Counsel and UFW moved to strike Respondent's fourth affirmative defense contending that the "lack of majority" defense is not cognizable under our Act. Rather, the General Counsel and UFW contended that under the Act an employer has a duty to bargain with a certified representative of its employees unless or until that representative loses its status through an election process established under the Act. The parties' respective positions regarding Respondent's loss of majority defense then took a curie turn. Respondent's counsel essentially withdrew at this hearing the purported good faith loss of majority as a defense, indicative that no new or additional evidence in support of the defense would be offered. Instead, Respondent would rely on the record established in the pending Lu-Ette Farms, Inc., 79-CE-4EC which was heard by Administrative Law Officer Robert LeProhn in November, 1980, and await his decision. I understood this to mean that Respondent's position was that Administrative Law Officer LeProhn and the Board's decision would be dispositive of the issue in this case as well. The General Counsel and UFW, on the other hand, pressed for a determination by the Administrative Law Officer as to the validity of the loss of majority defense in this case and in my decision as well.

While I am not unmindful of the Board's policy of requiring Administrative Law Officers to make 'determinations of new or unprecedented issues raised at a hearing,[4/] there are

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[4/] See, e.g. Sun Harvest, Inc. 6 ALRB NO. 4 (1980)

countervailing reasons why I decline to do so here. First, the issue does not appear to be "ripe" for resolution, in part because Respondent has chosen instead to submit the matter on the basis of the record and disposition in the earlier pending Lu-Ette hearing. Second, should the issue of the availability of the loss of majority defense require analysis and resolution, it would be forthcoming from Administrative Law Officer LeProhn, an able, competent and experienced hearing officer. In view of Respondent's submission of the issue on the basis of the same record in the earlier hearing, there would appear to be little that I could add in this decision. Finally, as a practical matter it appears doubtful that the defense, even if otherwise available under the Act, is factually present here. Bill Daniell Respondent's owner and President, made this abundantly clear in his inimitable fashion during cross-examination when he responded as follows:

> "Q. When did you believe the United Farm Workers stopped representing the majority of your workers; at what time did you come to that conclusion?
>
> A. I don't know whether I ever did come to that conclusion.
>
> Q. Is it your position, then, at this point, that the UFW does represent the majority of your workers?
>
> A. You know, I don't have any idea what your mind is, so I mean, how do I know what those people's minds are, you know. When I had the election back in 1976, I thought I'd win it hands down, no union. I was mistaken.
>
> * * * *

Q. So, as far as you are aware, you believe the UFW still -- legally still represents the majority of your workers?

A. I don't have any idea if they legally do or not, you know, I mean, if you went out there and took a vote today, they're not -- if we counted the ballots, I could say, yes, these people want the United Farm Workers or they don't, but I mean, I cannot be responsible to make a decision, me make a decision for myself on what beliefs that I believe that somebody else believes, you know, I mean, I just don't have that power. I'm not Jesus Christ." [5/]

B. General Findings Re Credibility

No credibility resolution between the four testifying witnesses was required by me. I found each of the four witnesses who testified, Bill Daniell, Respondent's owner, Mike Munoz,[5A/] its foreman, Ron Barsamian, its attorney-negotiator, and finally Chris Schneider of the UFW, to be essentially credible and forth-right witnesses who satisfied all the indicia for trustworthiness One further observation regarding Daniell might be appropriate however. Daniell is one of the most colorful and charismatic witnesses to ever testify at a hearing I presided over. Reading the testimony, which is sprinkled with expletives and earthy comments, may give the reader an occasional false impression of flippancy. Rather, I found him candid in his inimitable and earthy style. Indeed, it was not too difficult to visualize diminutive Chris Schneider's description of his efforts to serve the physically imposing Daniell at his ranch office in February, 1979, with a letter during the height of the Imperial Valley strike

[5/] See RT.I, pp. 25-27.

[5A/] But see p. 21, infra, re discussion of payroll records.

conflict and violence. Schneider's description of his meeting with Daniell and Daniell's observations of Schneider graphical underscore the difficulties that have ensued between Respondent and the Union.[6/]

C. Stipulated Statement Of Facts

The parties hereto have agreed to and executed a Stipulated Statement of Facts setting forth information pertinent, to the issues raised herein. A copy of this stipulation is attached as Appendix III. This stipulation constitutes the basic findings of fact in this case. Any additional or supplemental findings of fact are set forth and discussed in the analysis section which follows.

CONCLUSIONS OF LAW

I. Refusal By Respondent To Accept Certified Mail From The UFW.

The underlying facts are not in dispute. Respondents' owner, Bill Daniell, testified that he had a longstanding business policy of refusing to accept or claim certified mail regardless of the identity of the sender. His stated reason for this policy is that: "I've never received any source of payment in my life through certified mail. I've never had nothing but bad news."[7/] It was also undisputed that Mr. Daniell is the individual designated by his corporation as the agent for receiving service of process in California. Moreover, it was

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6/ Compare R.T. II, pp. 258-260 with R.T.II, 171, 189 and 186;

7/ See Vol. I, p. 11.

undisputed that commencing in late April, 1980, the UFW made offers to return to work on behalf of striking LU-ETTE workers. These offers were sent by certified mail by the UFW and were not picked up or accepted by LU-ETTE, pursuant to the above-stated policy.[8/] Respondent, however, did receive and accept regular mail from the UFW, including those offers to return which were also sent by regular rather than certified mail.

It does not appear that the ALRB has previously considered the issue of whether the refusal of an employer to accept certified mail from its employees' bargaining representation constitutes a violation of the Act. However, the issue has been considered by the NLRB and federal courts whose applicable decisions will be considered pursuant to Labor Code § 1148.

Under applicable NLRB precedent, an employer's unjustified refusal to accept certified mail from the union representing its employees violates Sections 8(a)(5) and (1) of the NLRA, and can constitute a refusal to bargain. [N. L. R. B. v. Regal Aluminum, Inc., 436 F. 2d 525 (.8th Cir., 1971), enf 'g. 171 NLRB 1403 [76 LRRM 2212] (J.968) ; Sharp's Market, Inc. 40 NLRB 122!. [52 LRRM 1214] (1963); Scott Gross Co., Inc., 197 NLRB 420 [80 LRRM 1379] (.1972); enf'd 477 F.2d 64 (6th Cir., 1973), [83 LRRM 2493]; and City Electric Co., 164 NLRB 844 [65 LRRM 1264, 1269] (1967).

[8/] See General Counsel's Exhibit 3 consisting of the seven original letters of offers to return which were returned' by the post office marked "unclaimed".

The majority of cases involving employer refusal to accept communications from the union typically concerns union demands for recognition and bargaining (.see, e.g., Scott Gross Co., Inc., supra; N.L.R.B. v. Quick Stop Markets, Inc., 416 F.2d 601 (7th Cir., 1968) [72 LRRM 2451]; Thurner Heat Treating Corp., 226 NLRB 716 [94 LR.RM 1446] (1976). However, the doctrine has also been applied where the employer had refused to accept the unconditional written offer to return to work proffered by the employee's attorney. See, e.g. The Barn-Sider,Inc., 195 NLRB 754 [79 LRRM 1587] (1972).

Respondent's brief (pp. 36-37) apparently implies that these precedents stand for the more limited proposition that an employer must accept the union's reasonable means of communication to it. While conceding that the ALRB regulations authorize service of papers by registered or certified mail (8 Cal.Admin.Code§ 20400)[9/], Respondent contends that service by regular mail pursuant to California Code of Civil Procedure §§ 1013, 1013a, is sufficient. LU-ETTE FARMS apparently accepts communications from the UFW when received in the regular mail. Respondent argues that neither the ALRB nor the UFW should be in a position to dictate or require it to accept certified mail there by changing its longstanding contrary business policy.

Both briefs cite to the Circle K Corp. 173 NLRB 713

[9/] The Act also similarly authorizes such service. See, e.g, Calif.Labor Code § 1151.4 (a). 8 Cal.Admin.Code § 20430, which would be the applicable provision here, also authorizes service by certified mail.

[69 LRRM 1420] (1968) in which the NLRB upheld the Hearing Examiner's finding of no employer violation for refusing to accept certified mail from the union. One critical difference however in the Circle K case was the employer had established for legal purposes a separate designated statutory agent to accept registered mail as well as service of legal process. By contrast here, the same person the UFW sought to serve the certified mail on, Bill Daniell, was also the designated statutory agent for LU-ETTE.

In the instant case, Respondent's refusal to accept UFW communications by certified mail had a very clear impact on its employees' rights established under Labor Code Section 1152. Significant wage entitlements may be established once the striking workers had substantiated that they had made unconditional offers to return, the dates thereof and that vacancies existed or thereafter occurred. Here, of course, the striking workers' efforts to not only establish the existence of their offers but also to substantiate the specific dates were thwarted by Respondent's policy and practice of refusing to accept certified mail. Nor is Respondent's suggestion that the UFW rely solely on the regular mail a viable alternative. It is readily apparent that certified mail offers both the addressee and sender the most accurate, efficient and effective means for determining whether and on what specific date a communication was received. More importantly, reliance on service by certified mail pursuant to Labor Code § 1151.4 (a) and 8 Cal.Admin.Code § 20430, provides the user with

an irrebuttable finding that service was accomplished. By contrast, proof of service by regular mail entitles the sender an irrebutable finding that service that accomplished. By contrast proof of service by regular main entitles the sender to only a rebuttable presumption, pursuant to Cal. Evidence Code §§ 641, 630 and 603, that the mail was received. The consequent diminished evidentiary effect in cases such as the instant one is all too significant.

I accordingly conclude that the General Counsel has sustained its proof that Respondent's refusal to accept certified mail from the UFW violates Section 1153 (a) of the Act[10/]

II. Whether The Offers To Return To Work Made By Striking LU-ETTE Workers Through The UFW Were Unconditional.

A. Is Labor Code, § 1160.2, A Bar To The Charge?

Labor Code, § 1160.2, provides in relevant part: "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." The unfair labor practice charged herein, the failure or refusal to rehire striking workers who unconditionally offered to return to work, was filed on December 23, 1980. Six months prior to the filing of the charge would relate back to June 23, 1980. However, at least three of the underlying letters offering to return to work, which are one of the necessary prerequisites in order

[10/] The General Counsel contends further that Respondent's practice and policy here also violates Section 1153 (e) of the Act in that it presents barriers to normal business means for the UFW to fulfill its bargaining responsibilities, while I don't doubt that the effect of Respondent's refusal to accept UFW certified mail would be equally damaging to the Union's ability to fulfill its bargaining responsibilities, nevertheless, no direct, specific evidence was introduced to that effect at the hearing. I decline therefore to include a finding that Respondent also violated Section 1153 (e) of the Act.

to be entitled to return, were sent in April and May, 1980.[11/]

The General Counsel notes in his brief (p. 10) and I concur that the operative fact here is the failure to reinstate, which occurred when hiring began for the ensuing melon harvest and lettuce thinning commencing in October and the lettuce harvest commencing in December, 1980. The refusal to rehire these workers clearly occurred within the limitation period.

General Counsel also contends that the offers to return to work were continuing ones and the refusal to reinstate is also a continuing one that extended into the six month period, citing to Trinity Valley Iron Co. v. NLRB, 410 F.2d 1161, 1172 (5th Cir., 1969) and Ron Nunn Farms (1980) 6 ALRB Mo. 41. In addition, General Counsel also contends that the six month limitation period does not begin to run until the charging party has actual or constructive notice of the violation of the Act, which occurred when the fall harvest season started, citing to Bruce Church Inc. (1979), 5 ALRB No. 45 and Montebello Rose/Mount Arbor Nurseries (1979) 5 ALRB No. 64.

I also concur that these alternative theories are also available to the General Counsel as well, but find it unnecessary to also base my finding on them, in view of the finding that the actual refusal to rehire occurred during the liability period.

[11/] See Exhibits "A", "B" and "C" to the First Amended Complain General Counsel's Exhibit 1-M. The actual letters comprise General Counsel's Exhibit 3.

B. Were The Offers To Return To Work By Striking LU-ETTE Workers Unconditional?

The essential facts are undisputed.

1) Written offers to return to work were made on behalf of approximately 55 striking LU-ETTE workers[12/] by communications from the UFW commencing on April 25, May 5, May 14, July 3, November 3 and 4, 1980.[13/]

2) These written offers were also suppplemented by an oral offer to return to work made at the October 30, 1980, bargaining session by the UFW's negotiator Ann Smith on behalf of all of LU-ETTE's striking workers. In addition, the Union sent a written communication dated November 2, 1980 (part of General Counsel's Exhibit 3) confirming that the offers to return were still in effect.

3} The written offers were said to be unconditional. Respondent, in turn, has refused to rehire any of its striking workers relying on a variety of legal and factual bases as follows:

1) The offers were not unconditional in that they were made through the Union who refuses to formally declare the strike ended against LU-ETTE, whose workers did not assure that they would not participate in work stoppages thereafter.

2) The character of the strike against LU-ETTE and

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[12] Some of the offers were duplicative. The individual names listed appear to be 34 or 35.

[13/] See the original offers, General Counsel's Exhibit 3 (consisting of seven letters).

other Imperial Valley companies was such as to raise the possibility that the workers had not abandoned the strike.

3) The strikers were permanently replaced.

APPLICABLE LAW

The law governing the respective rights of economic strikers and unfair labor practice strikers upon the making of an unconditional offer to return to work is now well established. In an unfair labor practice strike, the employer must, upon an unconditional request, reinstate the employee to his position and, if necessary, terminate the replacement. Mastro Plastics v. N.L.R.B., 350 U.S. 270 (1956). Failure to do so constitutes unlawful discrimination. N.L.R.B. v. Dubo Manufacturing Co., 353 F.2d 157 (6th Cir., 1965). An economic striker upon an unconditional offer to return must be reinstated, if not otherwise permanently replaced. In the event there has been a permanent replacement, the striking worker must be given preference in hiring when openings occur. N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Laidlaw Corp. (1966) 171 NLRB 1366, enf'd 414 F.2d 99 (8th Cir., 1969), cert.den. 397 U.S. 920 (1970).

General Counsel contends that the strike involved in this case was converted into an unfair labor practice strike by an invalid declaration of impasse on February 28, 1979, and/or the unilateral wage increases undertaken in 1979. The parties agree, however, this issue will be resolved from prior hearings on these matters.

Assuming, however, the strikers are economic ones and

General Counsel has established an unconditional offer to return to work, Respondent bears the burden of demonstrating that the failure to offer full reinstatement was for legitimate and substantial business reasons. N.L.R.B. v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938); Laidlaw Corp. (1968) 171 NLRB 1366, 397 U.S. 920 (1970). Thus, the burden of proof is on Respondent to show that: (1) economic strikers have been permanently replaced, or (2) that the job for which reinstatement is sought has been eliminated. N.L.R.B. v. Murray Products, 584 F.2d 934; [99 LRRM 3269] (9th Cir., 1978).

In determining whether an offer is unconditional, the word; of the offer, together with the context and attendant circumstance must be considered. Thus, the mere use of the word "unconditional is not enough to prove that the offer is in fact unconditional -- nor is the absence of that word indicative that the offer is not unconditional. N.L.R.B. v. Pechuer Lozenge Co., Inc., 209 F.2d. 393, 405 [33 LRRM 2324] (2nd Cir., 1953). In addition, the request for reinstatement must carry with it an understanding to abandon the strike, if the request is granted. See Hawaii Meat Company, Ltd, v. N.L.R.B., 321 F.2d 397 [53 LRRM 2872] (9th Cir. 1963); N.L.R.B. v. W.C. McQuaide, Inc., 552 F.2d 519, 539 [90 LRRM 1345] (3rd Cir., 1977). Significantly, the request for reinstatement may be tendered on behalf of the individual employee or employees by a union in its representative capacity. See, e.g. Santa Clara Farms (1979) 5 ALRB No. 67; Trinity Valley Iron &

Steel CO. v N.L.R.B. 410 P.2d 1161 [71 LRRM 2067] (5th Cir., 1969); N.L.R.B. v. W.C. McQuaide, Inc., supra. 552 F.2d at 529; N.L.R.B. v. Brown Root, Inc. 203 F. 2d 139, 147 [31 LRRM 2577] (8th Cir., 1953). In the Brown Root case the Court of Appeals observed:

> "We can think of no valid reason why a labor union which is the collective bargaining agent for employees who have been out on strike cannot effectively represent them in applying for re-instatement, even though the employer insists that they apply personally for re-employment." [Id.]

Finally, although a worker seeking reinstatement must abandon the strike (Marathon Electric Corp. (1953) 106 NLRB No. 199), he or she is not required to give up the rights guaranteed under Section 1152 of the Act or to promise not to strike or not to engage in work stoppages in the future. See Southern Fruit Distributors, 109 NLRB 386, 391 [34 LRRM 1367] (1954); Roadhome Construction Corp. 170 NLRB 668, 667 [68 LRRM 1191] (1968); Lindy's Food Center, 232 NLEB 1001, 1108;]96 LRRM 1386] (1977); Lion Oil Co. 245 F.2d 376, 378 [40 LRRM 2193] (8th Cir., 1957); Albion Corp. dba Brooks, 228 NLRB 1365, 1368 (1977), enf'd in petrtinent part 593 F.2d 936 [95 LRRM 1316] (10th Cir., 1977).

I have concluded that the offers to return to work by the Striking LU-ETTE workers were unconditional. I have further concluded for the reasons set forth below that the justifications proffered by Respondent are not supported by the record.

The undisputed evidence in the record (consisting of Chris Schneider's testimony and General Counsel's Exhibit 3)

shows that the offers to return to work were made by the UFW on behalf of specific individual workers who wanted to return to LU-ETTE. The first offers were made on April 25, 1980, after the strike had been in effect for approximately sixteen months. Apparently some of the striking workers approached the Union leadership and inquired whether they could return to work for Respondent without incurring Union sanctions.[14/] The LU-ETTE strike committee and UFW leadership agreed to allow workers who wanted to return to LU-ETTE to do so without reprisal. The UFW did not, however, officially abandon the strike. Written offers to return were then prepared by the Union staff, signed by the workers and sent by certified mail to Respondent and its attorney Ron Barsamian. The offers are facially unconditional imposing no conditions nor demands. After receipt, Respondent (or its attorneys) made no apparent effort to seek an explanation or clarification from the Union or its workers regarding the offers to return to work. Instead, it relied on its attorney Ron Barsamian's information and impressions resulting from his dealings with other growers regarding similar offers to return in deciding the offers were not unconditional.[16/]

Throughout the hearing as well as in the post-hearing brief, Respondent's counsel persistently sought to present extensive testimony and documentary evidence to demonstrate the nature of

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[14/] See, e.g., Resp.Exh. "C" setting forth the applicable provision of the UFW Constitution.

[15/] Chris Schneider Testimony, Vol. II, pp. 253-256.

[16/] See, e.g. Vol. Ill, pp. 301-306. 318.

the strike and violence against the Imperial valley growers including LU-ETTE during 1979. The purpose of such testimony and evidence was to establish Bill Daniell's state of mind regarding his refusal to rehire his former workers, his belief as to the purported UFW loss of majority representation, as well as his refusal to provide negotiating information to the UFW. This testimony, coupled with Mr. Barsamian's impression, it was argued constituted the justification for believing that the offers were not unconditional.

Although some testimony from Bill Daniell was permitted regarding his perceptions of violence and his state of mind during the January-March, 1979 period of the strike, much of the proffered evidence was limited to an offer of proof. The admitted evidence was limited because the great bulk of it occurred at other growers' premises primarily by other than LU-ETTE workers. Daniell did testify to two or three incidents that occurred at his premises in February and March, 1979, where eight or so of his employees were apparently identified as participating.[17/]

[17/] The picketing, confrontation and violence directed towards Respondent's operations were on a considerably reduced scale compared to some of the activities which were the subject of much of the court proceedings that Respondent sought to have administrate notice taken of. While not condoning any strike violence, the extent of such activities against LU-ETTE, particularly by LU-ETTE employees was on a scale and scope significantly and qualitatively different and less than against other Imperial Valley growers. While a number of plausible inferences can be drawn from this, at least one reasonable and plausible inference is that the relation-ship between LU-ETTE, its workers and the UFW caused this. If so it would considerably undermine Respondent's contrary inference that the Administrative Law Officer should consider all the picketing, confrontation and violence that occurred during the 1979 period of the Imperial Valley strike as justifying Respondent conduct and position taken therein.

Nevertheless, Daniell's and Barsamian's testimonies, taken at face value do not provide a legally justifiable basis for Respondent's course of conduct at issue herein. First, as indicated above, a reinstatement offer tendered on behalf of the striking employees by their union, which has not abandoned the strike, does not make the workers offers otherwise unconditional. The workers, by obtaining permission from their own strike co-ordinating committee and the Union hierarchy, had essentially abandoned the strike by their actions and their written, facially unconditional offer to return. See, e.g. N.L.R.B. v. Brown Root, Inc., supra. Moreover, by April 25, 1980, when the first offers; were made, there had been no strike activity directed against LU-ETTE for more than one year, except for several days of picketing (mostly by non-LU-ETTE workers) during the first week of the fall, 1980 harvesting.[18/] Nor could Respondent lawfully condition the reinstatement of its striking workers on their promise not to engage in future work stoppages or strikes or to otherwise give up rights guaranteed under Section 1152 of the Act.[19/]

Moreover, there is significant contrary evidence in the record that Respondent believed that its striking workers had an intent to unconditionally abandon the strike and return without intent to dimish its operation. Bill Daniell testified that he did not believe that the striking LU-ETTE workers would

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18/ See, e.g., Vol. II, pp. 220-221.

19/ See cases cited at p. 16 supra.

be violent or disruptive or try to sabotage his economic operatio if they came back.[20/] Essentially, Daniell believed that if they came back "I think . . . they'd probably be better workers than they've ever been in their lives."[21/]

Having found that the offers made to return were unconditional, the burden shifted to Respondent to demonstrate that the strikers had been permanently replaced or their position permanently eliminated. See, e.g., N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 378, 88 S.Ct. 543, 546-547 (1967); W.C.McQuaid Inc. 237 NLRB No. 26 [98 LRRM 1595] (1978); Sapek Corp., 235 NLRB No. 165 [98 LRRM 1241] (1978). Initially, Respondent attempted to meet this burden through the testimony of foreman Mike Munoz, who testified in essence that permanent replacement workers were obtained starting in March, 1979, who occupied thereafter the positions for which the strikers were applying.

20/ R.T.II, pp. 243-244.

21/ R.T.II, p. 244, lines 23-28. This testimony significantly undermined Respondent's primary basis for its theory of the case. Respondent's counsel has continually claimed that the relevance of the Imperial County Superior Court documents is that they show the UFW is a monolithic organization able to maintain an omnipresent control over all the striking workers at the various Imperial Valley (as well as Salinas, San Joaquin, etc. Valleys) growers. The UFW could, therefore, order the workers back on strike without further strike sanction. Respondent's theory does not take into account or give any weight to the fact that the ultimate course of conduct and strike activities are determined by the strike committee at each individual ranch, who are selected solely by the striking workers at that ranch. See, e.g., Respondent's Exhibit "D". testimony of David Martinez, that was stipulated to by the parties.

Munoz testified that after the initial replacement workers were obtained there was little turnover during the season and a high return rate from season to season.[22/] No payroll records were utilized during the hearing to corroborate this testimony since Respondent's payroll records did not lend themselves to such a readily ascertainable determination. Instead, the parties agreed to each append a summary of the payroll records to their respective briefs. A copy of the General Counsel's and Respondent's summaries are attached hereto as Appendices IV and V respectively. These summaries do not corroborate Munoz' testimony. Instead, they show that there were substantial numbers of vacancies from season to season.[23/] The summaries show for instance that in 1979 Respondent employed 115 workers in the honey dew harvest compared to 142 in 1980. However, only three workers returned from 1979 to work in the 1980 honey dew harvest. Similarly in 1979, Respondent employed 469 harvest workers compared to only 240 in 1980. Of this 240 total, only 62 worked in 1979. Thus, for the 1980 harvest season, the period that the strikers had timely offered to return to work for, Respondent had 178 job vacancies in the lettuce harvest and 139 vacancies for the honey dew harvest.

Thus, Respondent's own records show that there were ample vacancies available at the time of the strikers reinstatement offers and further supports the inference that the strikers were

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22/ See, e.g. R.T.I, pp. 93-94.

23/ See Appendices IV and V herein. Respondent's brief is more circumspect. It states that no general inferences can be drawn other than that the summaries reflect the transitory nature of agricultural workers (Resp. Brief, p. 11) .

not permanently replaced.

To summarize, I conclude that General Counsel has met its burden that the offers to return to work made by striking LU-ETTE workers through the UFW were unconditional. I further conclude that Respondent has failed to carry its burden to establish a legitimate and substantial business justification for failing to reinstate the strikers. I accordingly find that Respondent violated Sections 1153(a) and (c) of the Act by failing and refusing to reinstate its economic strikers.[24/]

III. Respondent's Refusal To Produce Information Requested By The UFW.

On October 30, 1980, the UFW at a bargaining session requested certain information from the Respondent relevant to the contract negotiations. This oral request was followed up two days later with a written request for information on six areas relating to the negotiations.[25/] The six areas on which information as requested were (1) crop acreage and type, (2) field locations (3) number of workers and job classification, (4) pay rates, (5) names, addresses and social security numbers of its employees and (6) the company's intent re workers who offered to return to work. Respondent has refused to provide the information. (See Appendix III, Stipulation, p. 6). Bill Daniell testified he did not provide the requested information "because he did not

24/ As indicated previously, I have assumed, without so finding that the strike remained an economic one. The decision whether the strike becomes an unfair labor practice one will be determine from the two other hearings raising those issues.

25/ See Respondent's Exhibit "A".

consider it any of the UFW's business" and some of the information (i.e., location of farming operations and identity of employees) could be used for harassment purposes.[26/]

The information requests made during negotiating is presumptively relevant to the Union's bargaining needs. An employer must furnish a union sufficient information to enable it to represent adequately employees in negotiating future contracts. (See O.P. Murphy (1979) 5 ARLB No. 63; As-H-Ne Farms (1980) 6 ALRB NO. 9; J.I. Case Co. v. N.L.R.B. 253 F.2d 149 [41 LRRM 2674] (7th Cir., 1968), enf'd as amended 113 NLRB 520 [40 LRRM 1208]; Curtiss-Wright Corp., Wright Aero Div. v. N.L.R.B. 147 F.2d 61 [59 LRRM 2433] (3rd Cir., 1965). Such information must be provided promptly. (Colonial Press, Inc. (1973) 204 NLRB 852 [83 LRRM 1648].)

Production information concerning the number of acres utilized, the nature of crops grown, and the location of the activities are relevant and necessary. (O.P.Murphy & Sons (1979) 5 ALRB No. 63.) The UFW, of course, is entitled to know the location of bargaining unit work. Also, economic information regarding the number of employees, job classifications, rates of pay, and subcontracting are classic areas of inquiry by unions and have been held to be always relevant. (See, e.g. N.L.R.B. v. Whitin Machine Workers 217 F.2d 593 [35 LRRM 2215] (4th Cir.1959) Boston Herald-Traveler Corp. v. N.L.R.B. 209 F.2d 134 [36 LRRM

26/ R.T.II, pp. 213-214.

2220] (1st Cir., 19551; N.L.R.B. v. Yawman and Erbe Mfg. Co. 187 F.2d 947 [27 LRRM 2524] (2nd Cir., 1951); N.L.R.B. v. Item Co. 220 F.2d 956 [35 LRRM 2709] (5th Cir., 1955).

While the identity of workers in the bargaining unit is also presumptively relevant (Preduntial Ins. Co. v. N.L.R.B. 412 F.2d 77 [71 LRRM 2254] (2nd Cir., 1969), cert.den. 396 U.S. 928 [71 LRRM 2254] (1969); Standard Oil Co. v. N.L. R.B. 399 F.2d 639 [69 LRRM 2014] (9th Cir., 1968); United Air Craft Corp. v. N.L.R.B. 434 F.2d 1198 [75 LRRM 2692] (2nd Cir., 1970), an employer may in some situations deny employee names and addresses to a union upon a showing of a bona fide concern about a "clear and present danger of harassment" and where the employer has offered reasonable alternatives. (Shell Oil Company v N.L.R.B. 475 F.2d 615 [79 LRRM 2997] (9th Cir., 1972).

In this case the only alternative means offered by Respondent was for the UFW to obtain the information themselves. While Daniell indicated he believes there had been harassment of his workers in the past, Respondent had not shown there was a "clear and present danger of harassment" of its current employees. In this case the majority of strike activity testified about occurred at work sites of other employers. More importantly, Mr. Daniell admitted he had observed no violence at LU-ETTE Farms and there has been virtually no picketing or violence, since the spring of 1979. In addition, it would appear that Daniell's stated concerns about his workers would be alleviated by reinstating the striking workers.

I conclude that the General Counsel has met its burden and established by a preponderance of the evidence that Respondent has violated Section 1153(e) of the Act by refusing to produce relevant information requested by the UFW.

IV. The December 1, 1980, Unilateral Increase In Wages.

The stipulation signed by the parties states that The lettuce piece rate paid by LU-ETTE beginning on December 1, 1980 was seventy nine cents ($.79). This was belatedly communicated to the UFW at the December 15, 1980 bargaining session by Respondent's negotiator. In its last proposal to the UFW prior to declaring impasse, Respondent offered a lettuce piece rate wage of seventy cents ($.70) for the 1980 lettuce harvest season. At the prior hearing regarding the 1979 unilaterally raised harvesting piece rate Mr. Daniell indicated that he raised the piece rate unilaterally, without prior notice to the Union, "Because we were at impasse". To the extent that that was a continuing reason for the 1980 unilateral raise as well, it will be considered and the validity decided in the two prior pending hearings.

Respondent, while admitting that it unilaterally increased the wages of its workers during the course of negotiations, contends that it nevertheless did not violate its duty to bargain in good faith for the additional reason that the wage raise was "maintaining the dynamic status quo". Respondent acknowledges that under applicable ALRB decisions, the Board has repeatedly held that unilateral wage increases during negotiations violate Sections 1153(e) and (a) of the Act. O.P. Murpny Produce

Co., Inc., 5 ALRB No. 63 (1979); Montebello Rose Co., Inc., 5 ALRB No. 64 (1979); As-H-Ne Farms, 6 ALRB No. 9 (1980) and Eto Farms, 6 ALRB No. 2 (1980). However, Respondent seeks to place its conduct within the exception to that rule which permits wage raises "consistent with the company's long-standing practice", citing to N.L.R.B. v. Katz, 369 U.S. 736, 746, [50 LRRM 2177] (1962). In Katz, the court implied that unilateral wage changes that "in effect, were a mere continuation of the status quo" would not constitute a violation of Section 8(a)(5), the analog to Section 1153(e). Ibid., p. 746, 82 S.Ct. at 1113. However, the availability of this defense is afforded to wage changes that are "in fact simply automatic increases to which the Employer has already committed himself." Ibid. The Supreme Court in fact rejected this defense in Katz because the wages challenged there "were in no sense automatic, but were informed by a large measure of discretion." Ibid.

Moreover, under Katz, even if an actual good faith impasse did exist as of February 28, 1979, Respondent's December 1, 1980 increase would be impermissible because the amount of the raise surpassed Respondent's most recent offer to the UFW. The Katz court held:

> "... [E]ven after an impasse is reached [the employer] has no license to grant wage increases greater than any he has ever offered the union at inconsistent with a sincere desire to conclude an agreement with the union."
> Katz, supra, 369 U.S. at 845.

See, also, Taft Broadcasting Co. (1967) 163 NLRB 475, enf'd 395 F.

F.2d 662 [67 LRRM 3632] [holding that post impasse unilateral changes are sanctioned if the changes are reasonably comprehended within the pre-impasse proposal]; Bi-Rite Foods, Inc. (1964) 147 NLRB No. 59 [57 LRRM 1150] [employer may validly make unilateral changes which are no more favorable than those offered prior to impasse]. Thus, under Katz the duty to bargain was violated when Respondent increased wages substantially above its last proposal without bargaining with the UFW about the increase.

Bill Daniel, Respondent's President, testified further as to his reason for unilaterally raising the wages. He testified that the wage increases were in keeping with a past practice of paving its workers according to a prevailing industry rate.[27/]

However, the evidence does not support this. First, Respondent has been under contract to various unions for approximately ten years (1970-1979).[28/] The wage rates Daniell paid were mandated by contract and were not the result of any dynamic status quo which commanded wage rates at the prevailing industry rates

Second, the ALRB has rejected this identical argument in a similar context:

> "Respondent had a pattern of granting such wage increases, after a request by the workers, every year during the pruning season. After a conference among the prevailing area wage rate respondent had raised wages in this manner every year since 1973. In 1977

27/ R.T.II, pp. 209-211

28/ R.T.II, pp. 234-235.

> and 1978, the pattern was repeated, despite the ongoing negotiations between respondent and the UFW.
>
> "In both years respondent notified the UFW of the wage increase by letter, but only after the increase was in effect. Unilateral action of this sort . . . violated the duty to bargain since the possibility of meaningful union input is foreclosed. [citations omitted]
>
> "Respndent's exceptions contend that the increases are legal because they follow a "well established Company policy of granting certain increased at specific times". The increases, it is argued, represent the maintenance of the "dynamic status quo", not a change in conditions. N.L.R.B. v. Ralph Printing & Lithography Co. (8th Cir., 1970) 433 F.2d 1058 [75 LRRM 2267]. While this is an exception to the general rule, the Katz case specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases here occurred only after an employee request, subject to refusal by respondent, and in an amount fixed by respondent's sense of the prevailing rate. We therefore conclude that the increases were discretionary and subject to collective bargaining."

(Kaplan's Fruit and Produce Company, 6 ALRB 36. In order for unilateral wage increases to come within the "dynamic status quo" doctrine, the increases must be of a nature that they are automatic at fixed intervals. (Kaplaps, supra; N.L.R.B. v. Ralph Printing and Lithog. Co. (8th Cir., 1970) 433 F.2d 1058 [75 LRRM 2267]; cf. State Farm Mut. Auto. Ins. Co. (1972) 195 NLRB 871 [79 LRRM 1621] [increased tied to known company policy and to objective government standards].) In this case, the increase was clearly discretionary based upon Mr. Daniell's view of the prevailing industry rate. Indeed, Daniell stated that there was nothing mandatory about paying the prevailing rate, adding, tongue in cheek that "next year I may go back to 50(cents).[30/]

30/ R.T.II, p. 232.

This conclusion is supported by the Board's most recent decision concerning unilateral wage increases. In Pacific Mushroom Farm (1981) 7 ALRB No. 28, the Board reasoned:

> " Moreover, since the employer's duty to bargain continues during a strike, a unilateral wage increase granted to nonstrikers is both a refusal to bargain under section 1153 (e) and an illegal discrimination under section 1153 (c), as the increase is inherently destructive of the empoyees' right to engage in concerted union activity. Burlington Homes, Inc., (1979) 246 NLRB No. 165 [103 LRRM 1116]; Soule Glass and Glazing Co. (1979) 246 NLRB NO. 135 [102 LRRM 1693].Respondent here has made such unilateral changes and, having failed to establish a business justification which outweighs the destructive effect on employee rights, Respondent has violated sections 1153(e), (c), and (a). See Elmac Corp. (1976) 225 NLRB 1185 [93 LRRM 1285].
>
> 7 ALRB No. 28 at p.2-3.

Accordingly, I conclude that the General Counsel has netits burden of, proof and clearly established that Respondent violated Sections (e),(c) and (a) of the Act by its unilateral increase in wages on or about December 1, 1980, without prior notice or bargaining with the UFW.

V. General Counsel's Request That The Board Re-Examine Its Policy And Methods For Calculating Back Pay Awards.

The General Counsel has devoted a considerable portion of its post-hearing brief to a presentation, with supporting citations and tables, that the Board reconsider its current policy and method concerning the calculation of back pay remedies. While I found the General Counsel's rationale and supporting citations and tables persuasive, this is obviously a policy matter which the Board is to consider and rule on. I would deem it inappropriate and decline to make a recommendation at this time.

I would, however, like to make one observation concerning my experience presiding at two back pay specification proceedings including the effect thereon of the present backpay calculation practices. In order to satisfy their respective obligations required by 8 Calif. Admin. Code Section 20290, Sunny side Farms (197: 3 ALRB No. 42 and J & L Farms (1980) 6 ALRB No. 43 in backpay proceedings, the parties must presently spend an inordinate amount of time (literally weeks or months) attempting to make daily calculations for each worker, pay period, each season and year that potential backpay computations could be awarded.

Thus, in cases where the backpay award computations are in theory required for one or more entire crew for several years, the resulting task becomes a difficult if not devastating one.

One obvious effect is the necessary but unfortunate resulting delay for all parties concerned, particularly the discriminatees.[31/] The sheer volume of paperwork, calculations, resulting human error and time impedes, in my judgment, an atmosphere for and ability to conduct realistic settlement discussions in a timely fashion.

In considering and fashioning a policy & computation method, including considering the General Counsel's request for an

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[31/] It is noteworthy in this regard that the recent Board decision John Van Wingarden, et al (1981) 7 ALRB No. 30, more than ten months transpired between the date the backpay proceedings were scheduled and the issuance of the Board's order concerning just one discrimantee. In the current backpay proceeding Impresiding at, Martori Bros., (1978) 4ALRB No. 80, three weeks are presently required in order for the parties to just review and compare daily payroll records and calculations for one crew (39 workers) cover ing several harvesting seasons over a two year period. This incurre time does not relate to or involve substantial legal and factual disputes still remaining unresolved.

inflation factor, I would respectfully urge the Board to consider a less burdensome computation method than the current one under Sunnyside Farms. One possible alternative, of course, is to consider other than daily time periods as an appropriate and reasonable one to utilize. For instance, weekly or monthly payroll summaries are typically available for use by all parties. I'm aware that in some cases these records may not be as "fine tuned" as daily computations; nevertheless, the resulting time savings may more than offset this concern.

THE REMEDY

Having found that respondent has engaged in certain unfair labor practices within the meaning of Sections 1153 (a),(c) and (e) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act as follows:

1. Having found that respondent failed to bargain in good faith in violation of its duty pursuant to Section 1153(e) of the Act. I shall recomment that respondent be ordered to cease and desist from unilaterally raising its workers wages.

2. Having found that respondent failed and refused to accept certified mail from the UFW in violation of its obligation under Section 1153 (a) of the Act, I shall recommend that respondent be ordered to cease and desist from continuing to refuse to accept certified mail from the UFW.

3. Having found that Respondent unlawfully refused to provide relevant information requested by the UFW thereby violating its duty to bargain in good faith pursuant to Section 1153(e), (c), and (a) of the Act, I shall recommend that Respondent be ordered to cease and desist from refusing to provide such information. In addition, I will further recommend that Respondent provide the information requested by the UFW that is more fully set forth in Respondent's Exhibit "A".

4. Having found that Respondent unlawfully refused to reinstate its striking workers who had made unconditional offers to return to work, I shall recommend that Respondent be ordered to cease and desist from refusing to reinstate said workers.

I will further recommend that Respondent make whole each of the entitled striking workers, by payment to them of a sum of money equal to the wages they would have earned but for Respondent's unlawful refusal to reinstate them, less their respective net interim earnings, together with interest thereon at seven percent per annum. Back pay shall be computed in accordance with the formula established in J. & L. Farms, 6 ALRB No. 43 (August 12, 1980).

If there are not sufficient jobs available to re-instate each of the claimants immediately or at the succeeding harvest they would otherwise have worked, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. The order of names on the preferential list shall be determined by company seniority or

pursuant to some other non-discriminatory method.

5. Finally, I will recommend that the attached Notice To Workers be posted, read and mailed to Respondent's employees in accordance with current Board practice.

ORDER

Upon the basis of the entire record and by authority of Labor Code Section 1160.3, I hereby issue the following recommended order that Respondent LU-ETTE FARMS, INC., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing any of its employees' wages, or any other term or condition of their employment, without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect thereto.

(b) Refusing to accept certified mail from the UFW.

(c) Refusing to provide relevant information requested by the UFW in performance of their collective bargaining responsibilities.

(d) Refusing to reinstate its striking workers who have made unconditional offers to return to work.

(e) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a)Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral change heretofore made in its employees' wage rates.

(b) If the UFW so requests, rescind the unilateral change in wage rates made by Respondent on or about December 1, 1980

(c) Make whole its employees for any economic losses suffered as a result of the unilateral change in wage rates made on or about December 1, 1980.

(d) Provide the UFW with each of the six areas of relevant information requested by the UFW and set forth in its letter dated November 2, 1980, which is set forth as follows:

(1) What is the current and projected crop program of the Company, including the number of acres of each crop grown and/or harvested by the Company?

(2) Where are all of the Company's agricultural operations located? Please list by citing canal and road names.

(3) How many workers does the Company employ and/or expect to employ in each job classification? Is the Company employing labor contractors to perform bargaining unit work?

(4) What are the current rates of pay for each job classification?

(5) Who are all the agricultural employees employed by the Company? Please provide an up-to-date list of

current employees and those to be recalled including their names, social security numbers and addresses.

(6) Does the Company intend to recall workers who have made unconditional offers to return to work?

(e) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate language, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the period and place (s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which may be altered, defaced, covered, or removed during the period of posting.

(g) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order to all Respondent's agricultural employees employed at any time during the payroll periods immediately preceding and following October 15, 1980, the approximate date that the first harvesting commenced subsequent to the initial offers to return being made.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent

on company time. The reading or readings shall be at such time(s and place(s) as are specified by the Regional Director. Following the readings), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request, and periodically thereafter, Respondent shall notify the Regional Director until full compliance is achieved.

AND, IT IS FURTHER ORDERED that all allegations contained in the amended complaint and not found herein to be violations of the Act are dismissed.

DATED: October 20, 1981.

AGRICULTURAL LABOR RELATIONS BOARD

Michael H. Weiss

MICHAEL H. WEISS
ADMINISTRATIVE LAW OFFICER

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which each side had an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have interfered with the rights of our agricultural workers by refusing to reinstate our striking workers during 1980 and 1981, The Board has ordered us to distribute and post this Notice.

We will do what the Board has ordered and also tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you.
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to try to get a contract or to help or protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT refuse to hire, reinstate, or layoff or threaten or otherwise discriminate against any employee because he or she exercises any of these rights.

WE WILL NOT fail or refuse to bargain in good faith with the UFW by unilaterally instituting wage increases, changing any other condition or term of employment without first giving notice and meeting with the UFW in order to negotiate over it.

WE WILL OFFER reinstatement to those persons who unconditionally offered to return to work with us in 1980 and 1981 and we will pay each of them any money they lost because we refused to reinstate them.

LU-ETTE FARMS, INC.

DATED:_____

By

_____

Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714). 353-2130

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

APPENDIX I

WITNESSES CALLED BY THE PARTIES

DATE	NAME	IDENTIFICATION	VOL & PAGE
July 13, 1981 July 14, 1981	1. WILLIAM 'BILL' H. DANIELL	President - Owner Lu-Ette Farms	I: 2-38 II: 170-250
July 13, 1981	2. MIGUEL 'MIKE' MUMOZ	Foreman	I: 38-94
July 14, 1981	3. CHRISTOPHER 'CHRIS' SCIIHEIDER	UFW Legal Asst.	II: 251-273
July 15, 1981	4. RON BARSAMIAN	LU-ETTE FARMS attorney & negotiator	III: 298-335

APPENDIX II

EXHIBIT WORKSHEET

CASE NAME: LU-ETTE FARMS CASE NO;8Q-CE-263-EC. ET AL.

J.C.	RESP.	C.P.	OTHER	IDENT .	ADMIT or REJECT.	DESCRIPTION
LA-IS				7/13/81	7/13/81	General Counsel's Moving Papers
2				7/13/81	7/13/81	General Counsel's Trial Memo
3				7/13/81	7/13/81	Original offers to return -7 letters
	A			7/14/81	7/14/81	11/1/80 letter - UFW to Stoll
	B			7/14/81	7/14/81	2/12/81 letter - UFW to Western Growers
	C			7/14/81	7/14/81	UFW Const.
	D			7/14/81	7/14/81	Testimony of David Martinez
	E			7/14/81	Not rec'd.	Copies of TRO and Prelim. Injunct; and Contempt Orders issued by
						Imperial superior Court NOT RECEIVED
	F			7/15/81	7/15/81	6/18/80 letter - Barsamian to Chr Schneider
	G			7/15/81	7/15/71	3/16/81 letter - Barsamian to Chr Schneider
	H			7/15/81	7/15/81	3/16/81 letter - Barsamian to Chr Schneider

APPENDIX III

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-263-EC 80-CE-264-EC STIPULATED STATEMENT OF FACTS

The parties to this unfair labor practice hearing (General Counsel, The United Farm Workers, Charging Party, and Lu-Ette Farms, Inc., Charged Party) through their respective attorneys have agreed to the following Statement Of Facts. It is farther agreed that this Stipulated Statement Of Facts shall be concerned in to evidence in the above referenced unfair labor practice hearing.

A. Background

This case originates from failed contract negotiations which began in late 1978 between Respondent, Lu-Ette Farms, Inc., 'hereinafter respondent or Lu-Ette) and the United Farm Workers of Africa, AFL-CIO, (hereinafter UFW).

The respondent, Lu-Ette Pants, Inc. , farms approximately 2,500 to 3,000 acres of land in the Imperial Valley. In addition to lettuce and melons, Lu-Ette harvest; such crops as alfalfa, hay, cotton, pumpkins, and banana squash. Mr. Bill Daniell is president of Lu-Ette farms and is responsible for management decision within the company and thus makes all decisions concerning the wages he

pays His workers.

The United Farm Workers was certified as the collective bargaining representative of respondent's agricultural employees on September 29, 1976.

A collective bargaining agreement between the UFW and Lu-Ette was executed on December 2, 1977. This agreement ended by its own terms on January 1, 1979 but was extended by both parties up to January 15, 1979.

Negotiations for a new contract began in November 1978 and extended over a period into February 1979. Lu-Ette became part of an industry wide bargaining group which was composed of at most 28 growers who were all simultaneously, yet separately, negotiating with the UFW for new contracts. Initially Lu-ette was only an observer to the negotiations. However, it became an official participant in the bargaining group in the early part of December 197S. Lu-Ette was represented in this group by its negotiator, Charley Stoll.

On February 21, 1979, the industry wide bargaining group submitted a written contract proposal to the UFW. This proposal contained proposed wage rates for all job classifications. The document was signed by representatives of the growers including Charley Stoll. Lu-Ette, was a participant in this proposal. Relevant to this case is the wage offered for lettuce piece rate workers for the 1980-81 harvest which was 70 cents.

The UFW submitted a counter-proposal on February 28, 1979. After the union submitted their counter offer at the February 28th meeting the employer group, including Lu-Ette, responded by declaring impress. The good or bad faith status of this declaration of

impasse was the subject of an unfair labor practice hearing before the Administrative Law Officer Jennie Rhine (Admiral Packing, et. at., 79-CE-78-EC, et. al.). In her decision dated March 28, 1979, the ALO found that the declaration of impasse made by the employers on February 28, 1979, was in bad faith and therefore in violation of sections 1153(a) and 1153(e) of the ALRB. (See pp. 55-58 of the decision). This decision is now before the Agricultural Labor Relations Board for its review.

Following the declaration of impasse it was charged that respondent engaged in a number of unilateral wage increases to its workers and other changes in conditions of employment during 1979 and the 1979-80 lettuce season Chase allegations are the subject of another unfair labor practice charge and complaint. This matter (Lu-Ette Farms, Inc., Case Nos. 79-CE-4-EC, et seq.) was heard by Administrative Law Officer Robert LeProhn in November, 1980, and is presently awaiting the decision of Mr. LeProhn.

B. The Present Charges

Beginning in April, 1980, various Lu-Ette workers who had been on strike since January, 1979 made written offers to return to work. General Counsel and the UFW contend and respondent disputes that these offers to return to work were unconditional. These offers were mailed by certified

mail to respondent at its business address by the United Farm Workers, for the individual employees. Each mailing of offers (April, May; July, November, 1980, January, 1981 and February, 1981) was unsuccessful in that the letters were returned "unclaimed" to the UFW. The United Farm Workers therefore sent copies of all offers to return to Mr. Ron Barsamian, attorney for respondent, or the legal office of Western Growers Association in El Centro, California.

On October 30, 1980 at the request of the UFW a meeting between the parties was held. Ms. Ann Smith the UFW assigned negotiator requested the following information from the Lu-Ette representatives, Mr. Stoll and Mr. Barsamian:

(1) What is the current and projected crop program of the company, including the number of acres of each crop grown and/or harvested by the company?

(2) Where are all of the company's agricultural operations located? Please list by citing canal and road names.

(3) How many workers does the company employ and/or expect to employ in each job classification? Is the company employing labor contractors to perform bargaining unit work?

(4) What are the current rates of pay for each job classifications?

(5) Who are all the agricultural employees employed by the company? Please provide an up-to-date list of current employees and those to be recalled including their names, Social Security numbers and addresses.

(6) Does the company intend to recall workers who have made unconditional offers to return to work?

In addition to the above request for information Ms. Smith made a modification to the UFW's February 28, 1979, proposal concerning the medical plan contributions of employers. She also advised that the employer has a duty to advise and negotiate with the union regarding unilateral increases in the terms and conditions of employment and that an administrative law officer had found respondent's declaration of impasse to be in bad faith.

Respondent's agents failed to respond to Ms. Smith's statements and request except to note that they had no knowledge of any written request to return to work having been made to Lu-Ette. Ms. Smith responded by making an oral offer en behalf of all Lu-Ette seniority workers to return, to work.

Mr. Barsamian then explained that he had received some copies of written offers made by individual employees to return to work[3/] but that he was not aware of any other offers. Ms. Smith was of the opinion that a general offer, or at least a substantial number of Lu-Ette seniority workers had offered to return to work. Ms. Smith then repeated the offer on behalf of all Lu-Ette seniority workers.

[1/]As of October, 1980, Mr. Barsamian had received copies of lists which included 34 individual names.

On December 1, 1980, respondent raised it piece rate wage for lettuce harvest workers to seventy-nine (.79) cents. In Respondent's last proposal of February 21, 1979, the offer for the 1980-80 season was for 70 cents.

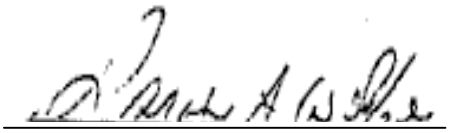
The bargaining agents for the parties met again on December 15, 1980. Mr. Stoll informed Ms. Smith that Lu-Ette intended to raise its lettuce harvest piece rate to seventy-nine cents. He stated that this was the only change the Company had to make on this date in the proposal which had been made originally on February 21, 1979. Mr. Stoll refused to provide any of the information requested at the October 30, 1930, meeting.

Since the October 30, 1980 meeting, Lu-Ette has not provided the requested information and has not recalled workers who made offers to return to work which the UFW and General Counsel contend are unconditional and Respondent contends is not.

In March, 1981, Mr. David Martinez for the UFW, and Mr. Ron Barsamian, for Lu-Ette Farms, held a bargaining session. There have been ___ negotiations between the parties since that time.

The UFW is still on strike against Lu-Ette Farms.

APPROVED BY:

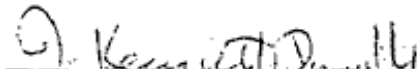


SARAH A. WOLFE
ATTORNEY FOR RESPONDENT

7/14/81
DATED

NED DUNDHU DATED
LEGAL ASSISTANT FOR UWF

7/14/81
DATED



J. KENNETH DONNELLY
LEGAL COUNSEL FOR
GENERAL COUNSEL - ALRB

7/14/81
DATED

APPENDIX IV

	CROP	TOTAL NO. OF EMPLOYEES IN 1979	TOTAL NO. OF EMPLOYEES IN 1980	NO. OF EMPLOYEES RETURNED FROM 1979 TO WORK 1980	TOTAL NO. OF EMPLOYEES IN 1981	NO. OF EMPLOYEES RETURNED FROM 1979 TO WORK 1981	NO. OF EMPLOYEES FROM 1979 WHO WORKED BOTH IN 1980 AND 1981
A.	Honeydew	115	142	3	N/A	N/A	N/A
B.	Thinning	456	189	56	61	15	11
C.	lettuco Harvest	469	240	62	N/A	N/A	N/A
D.	Irrigators	74	N/A**	22	N/A**	10	10
E.	Tractor Drivers	49	N/A**	11	N/A*	3	3
F.	Tractor Drivers						
	Irrigators	123	91	33	29	13	13

* Includes all employees from March 1979 to December 31, 1979

** These figures were not broken down by a separate classification but were totaled under irrigators and tractor drivers

***This figure represents combined figures for tractor drivers and irrigators, i.e. D & E.

EXHIBIT “B”

Appendix IV

INFORMATION ON GERMANAN OF PLACEMENTS

Crop of Job Classification	Number of Persons Actually Employed			Average Number of Employees in any year [3]	Number of Employees Returning from 1979 (season)			Average No. of Lines in Lettuce Harvest [4]	
	1979	1980[2]	1981		In'80	In'81	In'80 & '81	79-80	80-81
tractor drivers	49	91	29	10 (PRT II/154)	11	3	3		
irrigators	74			8-15 (PRT II/155)	22	10	10		
melon harvest	115	142		--	3				
lettuce harvest	469 (1979-80 harvest)	240 (1981-81 harvest)		75 (PRT II/72)	64			32-36 lines (96-108) people	22-24 lines (66-72people)
thinning weeding	456	164	61	Melons 20-25(PRT II/153) Lettuce 35-70 PRT II/153)	53	15	11		

[1] Date on this chart gathered from payroll records and testimony where indicated.

[2] In 1980 and 1981 lists, tractor drivers and irrigators are combined.

[3] All this information is from Mr. Daniell's testimony in the the previous hearing

[4] This is the testimony of Mike Munox (See, R.T. I/87 – 88)

ATTACHMENT B

Appendix V